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CITATIONS

400-006—70——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 144

EUGENE GRIFFIN, ET AL., PETITIONERS

v.

LAVON BRECKENRIDGE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This case presents a fundamental question: Whether federal law affords civil redress to the victims of concerted racial violence calculated to deter the exercise of basic rights by the members of the black community. The answer turns upon a correct construction of the Amendments to the Constitution adopted immediately following the Civil War and the implementing legislation passed by Congress during the Reconstruction era. Although much that touches the subject has been written in this Court during the intervening years, the fact is that the question remains unsettled today, so long after the operative enactments.

STATUTE INVOLVED

The full text of 42 U.S.C. 1985(3) is as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

We stress, at the outset, the boundaries of the issue. The present complaint alleges that two white persons, acting together but without any color of authority from the State, stopped five black citizens travelling in a car (one of whom they mistakenly believed was a civil rights worker), held their victims at gun point and seriously beat them. This was done, it is alleged, because the travellers were black and with the purpose of preventing them, and deterring others of their race, from enjoying their civil rights. These were listed in the complaint as "including but not limited to" the rights of petitioners "and other Negro-Americans" to "freedom of speech, movement, association and assembly; the right to petition their government for redress of grievances; their right to be secure in their person; their right not to be enslaved nor deprived of life, liberty or property other than by due process of law, and their rights to travel the public highways without restraint" (A. 6; see, also, A. 5).

The question is whether these allegations state a claim for monetary damages under 42 U.S.C. 1985(3) (derived from Section 2 of the Ku Klux Act of April 20, 1871) which affords such relief to the victims of any combination of "two or more persons in any State or Territory [who] conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * *." The courts below thought not, the court of appeals affirming the dismissal of the

complaint with apparent reluctance but believing itself compelled to do so by this Court's decision in *Collins* v. *Hardyman,* 341 U.S. 651. We disagree, and, accordingly, must confront the further question whether the statute is constitutional insofar as it covers the case—an issue suggested by the Court's opinion in *Hardyman* and the ruling in *United States* v. *Harris,* 106 U.S. 629, invalidating the criminal counterpart of Section 1985(3). Again, we answer in the affirmative, believing that both the Thirteenth and Fourteenth Amendments authorize this legislation.

ARGUMENT

I. THE COMPLAINT STATES A CLAIM WITHIN SECTION 1985(3)

The question whether Section 1985(3) embraces our case cannot be resolved by looking to the prior decisions of this Court. Indeed, at one extreme, there are the rulings in *United States* v. *Harris,* 106 U.S. 629, and *Baldwin* v. *Franks,* 120 U.S. 678, which read the identically worded criminal provision from a common source[1] very broadly to reach acts of violence

[1] Both the civil and criminal provisions originated in §2 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, which, in relevant part, read as follows:

> That if two or more persons within any State or Territory of the United States * * * shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from

committed by entirely private groups against individuals without regard to their race or membership in

giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of

any definable class,[2] and, accordingly, struck down the statute as unconstitutional. At the other pole is *Collins* v. *Hardyman*, 341 U.S. 651, in which (to borrow the characterization used in *Adickes* v. *Kress & Co.*, 398 U.S. 144, 165 n. 31) "the Court in effect interpreted § 1985(3) to require action under color of law even though this element is not found in the express terms of the statute." More recently, however, the Court has indicated that the matter remains open, by noting

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appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

It was in the Revised Statutes of 1874 that the criminal and civil provisions were first separately stated, as § 5519 and § 1980, respectively. Until it was repealed in 1909 (Act of March 4, 1909, 35 Stat. 1088), § 5519 punished the same conspiracies as § 1985(3)—except those directed against voting in federal elections—in the identical words. In *Collins* v. *Hardyman*, *supra*, 341 U.S. at 657, the language of the two sections is said to be "indistinguishable."

[2] The indictment in *Harris* (106 U.S. at 629–632) alleged that a group of twenty armed men seized four prisoners from the custody of a local sheriff and beat them, the claim being that this reflected both a conspiracy to deprive the prisoners of the "equal protection of the laws" and a conspiracy "for the purpose of preventing and hindering the constituted authorities * * * from giving and securing to [them] * * * the equal protection of the laws * * *." Neither the race of the assailants nor of the victims was stated, and it was not alleged that the latter were otherwise members of any identifiable class. The Court expressly held that the actual charge "would be a good indictment under the law if the law itself were valid" (106 U.S. at 639), and went on to construe the statute as reaching purely private conduct (106 U.S. at 639–640) directed by whites against whites (106 U.S. at 641).

that it was not "intimating any view concerning the correctness of the Court's interpretation of § 1985(3) in *Collins*." *Adickes* v. *Kress & Co., supra,* 398 U.S. at 165, n. 31. See, also, Mr. Justice Harlan, concurring, in *Monroe* v. *Pape,* 365 U.S. 167, 200–201, particularly n. 9. And, so, we must turn elsewhere to find a middle ground between what is, in our view, the too expansive reading of *Harris* and the too restrictive construction reflected in *Collins*.

1. We begin with a textual analysis of the provision, as explicated in *Collins*. See 341 U.S. at 659–660. Following that opinion, we read the statute, so far as relevant to our case, as allowing a recovery in damages to anyone "injured in his person or property" by "any act in furtherance of the object" of a "conspiracy" defined by the forepart of the section. Since the requirement of an injury and its causal connection is plainly satisfied here, we focus on the statutory definition of the conspiracy aimed at. Here, too, we are content to adopt the summary given in *Collins:* "Its essentials, with emphasis supplied, are that two or more persons must conspire (1) for the purpose of *depriving* any person or class of persons of the *equal protection of the laws,* or of *equal privileges and immunities under the law;* or (2) for the purpose of preventing or hindering the constituted authorities from giving or securing to all persons the equal protection of the laws; or (3) to prevent by force, intimidation, or threat, any citizen entitled to vote from giving his support or advocacy in a legal manner toward election of an elector for President or a member of Congress; or (4) to injure any citizen in person or

property on account of such support or advocacy." As is happens, it is equally true of the present suit that "[t]here is no claim that any allegation brings this case within the provisions that we have numbered (2), (3), and (4), so we may eliminate any consideration of those categories. The complaint is within the statute only if it alleges a conspiracy of the first described class. It is apparent that this part of the Act defines conspiracies of a very limited character. They must, we repeat, be 'for the purpose of *depriving* * * * of the *equal protection of the laws,* or of *equal privileges and immunities under the laws.*"

The critical question, then, is whether the sort of conduct disclosed by the complaint may fairly be characterized as intending to deprive the petitioners of the "equal protection of the laws" or "equal privileges and immunities under the laws." The *Collins* opinion apparently answers in the negative, on the sole ground that, unless "the law or its agencies [were] to give sanction or sanctuary" to private conduct, the victims' "rights *under the laws* and to *protection of the laws* remain untouched and equal to the rights of every other [person within the State]" (341 U.S. at 661). We believe the opposite conclusion is warranted, for several reasons.

First, as a matter of language, there is no reason to restrict the expression "deprive * * * of the equal protection of the laws or of equal privileges and immunities under the laws" to the situation in which State laws are unequal or are unequally applied by State officers. It would be different if the statute were addressed only to the "State" (as in the Equal Pro-

tection Clause of the Fourteenth Amendment) or to those who are acting "under color of any law" (as in 42 U.S.C. 1983 and 18 U.S.C. 242, which, on the other hand, are not limited to the protection of "equal" rights). But, in terms, our provision speaks to any "two or more persons," presumably including ordinary citizens without any official status or authorization from the State. The only question, then, is whether anyone not wielding State power or carrying out State policy can be deemed capable of "depriving" one class of persons of the same legal protection or legal rights as others enjoy. We think the answer is clear. Private individuals, especially when acting in groups, may effectively deprive citizens of the equal benefit of the laws. This can happen, as another portion of the statute expressly contemplates, by action against State officials to prevent them from affording equal treatment. Or it can result from acts of intimidation aimed directly at those whom the conspirators wish to deter from exercising their legal rights. In such a case, it may be that the "right" of the victims to the benefit of equal laws is "untouched"; but they have, nevertheless, been deprived of the enjoyment of that guaranty.[3]

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[3] As Mr. Justice Brennan has recently noted, "deprivation" of a constitutional right cannot mean "extinguishment," else the provision has no bite whatever since only a constitutional amendment can legally abrogate such a right. See *Adickes* v. *Kress & Co.*, *supra*, 398 U.S. at 223–224. It has, of course, long been recognized that the constitutional guaranty of equal protection of the laws includes a right to equal enjoyment of the laws' benefits (see *infra*, p. 31). There is no reason to read more narrowly the same language in the statute.

A second objection to reading Section 1985(3) as reaching only action under color of law is that it produces several anomalies. One is that such a construction makes the statute wholly superfluous in light of Section 1983—originally § 1 of the same enactment of which our provision was § 2. That Section already allowed recovery for injuries resulting from acts under color of law invading any right secured by federal law, constitutional or statutory—which of course includes the right to obtain "equal protection" from those acting under State authority (see *Adickes* v. *Kress & Co., supra*).[4] Also incongruous (as three members of the Court noted in *Collins* v. *Hardyman, supra*, 341 U.S. at 664) is the image of State officials, or persons shielded by the umbrella of State law, "go[ing] in disguise on the highway," an activity which our statute contemplates. And it would be very strange if Congress, having used unqualified words—"two or more persons"—at the beginning of the provision to encompass every potential conspirator, then narrowed it to include only State agents by the very indirect device of defining an actionable conspiracy as one composed of persons with official power to deprive citizens of the "equal protection of the laws."

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[4] 42 U.S.C. 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Finally, the historical context and legislative history of the statute bely any purpose to confine its reach in the way suggested by the *Collins* opinion. As we have noted, Section 1985(3) derives from Section 2 of the Act of April 20, 1871, popularly known as the "Ku Klux Act". The activities of that organization and others like it, operating wholly outside the law, have been sufficiently noticed here as a primary concern of the Reconstruction Congress. It is enough to point out that on other occasions the Court has invoked the evident purpose to deal with such conspiracies to show that contemporary legislation reached purely private conduct. See, *e.g.*, *Jones* v. *Mayer Co.*, 392 U.S. 409, 436 (§ 1 of Civil Rights Act of 1866); *Ex parte Yarbrough*, 110 U.S. 651, 667 (§ 6 of the Act of May 31, 1870); and see *United States* v. *Price*, 383 U.S. 787, 804–805. The same reasoning is obviously applicable in the case of a statute so uniquely pre-occupied with this kind of lawlessness. See *Monroe* v. *Pape*, 365 U.S. 167, 174. That was, indeed, the conclusion of a more contemporary Court in *United States* v. *Harris*, *supra*, which went so far as to suggest that the indistinguishably worded criminal provision derived from the same Section 2 of the 1871 Act embraced *only* private conspiracies. 106 U.S. at 640. See, also, Mr. Justice Burton, joined by Mr. Justice Black and Mr. Justice Douglas, dissenting in *Collins* v. *Hardyman*, *supra*, 341 U.S. at 663–664.

In light of the Court's very recent canvassing of the subject in *Adickes*, and earlier in *Monroe* v. *Pape*, *supra*, it would be redundant to quote from the legislative debates to show that Congress believed it was

here dealing with private conduct. The *Adickes* opinion concisely summarizes the matter: in contrast with Section 1 (now 42 U.S.C. 1983), "§ 2 of the 1871 Act [now 42 U.S.C. 1985(3)], a provision aimed at private conspiracies with no 'under color of law' requirement, created a great storm of controversy, in part because it was thought to encompass private conduct" (398 U.S. at 165). It may be added that this reach which worried the opponents of the Section was not denied by its proponents, but, on the contrary, was stressed. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess., App. 69 (Rep. Shellabarger), 478 (same), 481–484 (Rep. Wilson), 485 (Rep. Cook), App. 188 (Rep. Willard), 505–506 (Sen. Pratt), 514 (Rep. Poland). Most such statements, we note, were specifically directed at the provision which concerns us, involving conspiracies designed to work a deprivation of "the equal protection of the laws".

2. The overwhelming evidence that the framers of Section 1985(3) meant to reach wholly private conspiracies cannot be diluted, we submit, by suggesting that only the Klan at its strongest, or a comparable force, was in mind. See *Collins* v. *Hardyman, supra,* 341 U.S. at 662. The clear answer is that given in *United States* v. *Mosley,* 238 U.S. 383, 387, 388, with respect to the similarly-worded 18 U.S.C. 241, another conspiracy provision of the Reconstruction era which in terms reaches any "two or more persons", albeit its "source in the doings of the Ku Klux and the like is obvious." As Mr. Justice Holmes said for the Court, "now that the Ku Klux have passed away * * * we cannot allow the past so far to affect the present as

to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords."

That has been the Court's approach more recently in construing Reconstruction legislation, eschewing "ingenious analytical instruments" which would avoid giving the statute "a sweep as broad as its language." *United States* v. *Price, supra,* 383 U.S. at 801; *Jones* v. *Mayer Co., supra,* 392 U.S. at 437. And the same rule should obtain here: on its face, Section 1985(3) reaches a conspiracy involving as few as "two or more persons", language that encompasses a great deal besides the "private army" associated with the Klan of a century ago.

Nor is this taking undue advantage of inadvertently loose words, "a mere slip of the legislative pen" (*Jones* v. *Mayer Co., supra,* 392 U.S. at 427). As Mr. Justice Harlan has noted, in what may properly be termed a classic understatement, "the legislative history is not without indications that what the words of the statute seem to state was in fact the meaning assumed by Congress." *Monroe* v. *Pape, supra,* 365 U.S. at 201 (concurring opinion). We need only reproduce one passage quoted in the margin of that opinion (*id.* at n. 10), where an opponent of the legislation remarks:

> "* * * It does not require that the combination shall be one that the State cannot put down; it does not require that it shall amount to anything like insurrection. If three persons combine for the purpose of preventing or hindering the constituted authorities of any State from extending to all persons the equal protection of the laws, although those persons

> may be taken by the first sheriff who can catch them or the first constable, although every citizen in the country may be ready to aid as a *posse,* yet this statute applies. It is no case of domestic violence, no case of insurrection, and no case, therefore, for the interference of the Federal Government, much less its interference where there is no call made upon it by the Governor or the Legislature of the State." [Cong. Globe, 42d Cong., 1st Sess.], App. 218 (Senator Thurman); see also *id.,* at 514 (Rep. Farnsworth).

3. It does not follow, however, that Section 1985(3) deals with all group conduct which interferes with the enjoyment of rights. In our view, the *Harris* decision read too much into the statute when construing it as reaching every conspiracy invading life, liberty or property. That might well have been within the coverage of the original version of the provision, which omitted the word "equal". See Cong. Globe, 42d Cong., 1st Sess. 317. But it was precisely to overcome the objection that the bill encompassed all ordinary torts and crimes that it was amended to confine its reach to deprivations of equality, rather any deprivation of rights. See opinion of Frankfurter, J., in *Monroe* v. *Pape, supra,* 365 U.S. at 229-234, particularly nn. 48, 49. Nor was this a meaningless change of words, carrying forward the full original coverage under an "equal protection" label. We fully accept the statement in *Collins* v. *Hardyman, supra,* 341 U.S. at 661, that it is no deprivation of "equal protection" or of "equal privileges and immunities" within the meaning of Section 1985(3) "to assault one neighbor without assaulting them all, or to libel some

persons without mention of others." Indeed, we have no occasion here to quarrel with the holding in *Collins* that the facts revealed there do not amount to a deprivation of "equal protection."

The scope of the provision, we submit, is this: that Federal law will intervene whenever group conduct (usually wholly unsanctioned by State authority) attempts to prevent a class of citizens from enjoying, equally with others, the "protection" of State or federal "laws" or the "privileges and immunities" they grant[5]—whether this is sought to be accomplished by

[5] Throughout the preceding discussion, we have assumed that the reference to "laws" in the expressions "equal protection of the laws" and "equal privileges and immunities under the laws" encompassed both federal and State law, in the broadest sense. For the purpose of this case, however, the correctness of that conclusion is of no importance, provided only the term "laws" in the "equal protection" provision includes all State governmental actions that would be embraced by the Equal Protection Clause of the Fourteenth Amendment—an undisputable proposition. That is a fully sufficient basis for recovery under the present complaint.

It may be that the "privileges and immunities under the laws," the "equal" enjoyment of which our provision protects, do not include those conferred by State law. We are inclined to the opposite view, however, because that seems the natural reading of the words, and a result strongly suggested by the Fourteenth Amendment background of the statute. We must remember that, at the time, the distinction later drawn between privileges of *national* citizenship and privileges derived from State citizenship was not understood. At all events, the statute, in this part, does not speak of privileges and immunities "of citizens of the United States" (like Section 1 of the Fourteenth Amendment), but, rather, privileges and immunities "under the laws," presumably including the same State "laws" just referred to in the "equal protection" provision. Finally, since the guarantee is one of *equality*, there could be no constitutional reason for limiting it to federally-granted rights:

pressuring government officials to discriminate or by intimidating the ultimate victims from asserting their legal rights. To be sure, Section 1985(3) is not in unambiguous terms confined to *class* discrimination, since it speaks of "depriving * * * *any person or* class of persons." But it is highly doubtful if any assault against a single individual committed without regard to his membership in a class, and aiming at him alone, was within the contemplation of Congress, many of whose members conditioned their support of the legislation upon adoption of the narrowing amendment. Nor is it clear that such an isolated "inequality" could qualify as a denial of "equal protection" even if a State agency were accountable. See *Snowden* v. *Hughes,* 321 U.S. 1. The proposition is all the more dubious in the context of private action. At all events, there is no occasion here to read into the statute any purpose to reach more than invidious class discriminations. Indeed, for the present case, it is enough to say that Section 1985(3) strikes at group efforts to deprive one race of their legal rights, which was, of course, the main thrust of the enactment.

4. We have noted that the complaint purports to specify certain rights against which the conspiracy was directed. This may be relevant, as the court below evidently believed.[6] Cf. *Screws* v. *United States,* 325 U.S. 91; *United States* v. *Guest,* 383 U.S. 745. But, in

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the Equal Protection Clause enjoins the State to avoid discrimination with respect to the privileges and immunities derived from State, as well as federal, law.

[6] The court of appeals apparently read the complaint as alleging an interference with the right of *interstate* travel, held protected against private conspiracies in *United States* v. *Guest,*

our view, the attempt to particularize the rights affected is both unreal and unnecessary in a case like the present one. Cf. Mr. Justice Rutledge, concurring, in *Screws* v. *United States, supra,* 325 U.S. at 114–117. It is a rare case in which the victim can show precisely what protected activities the assault against him was meant to inhibit. Indeed, in the typical instance of this kind, the conspirators themselves have no more specific object than to deter black citizens from asserting a claim to equality in civic life—whether it be equal enjoyment of the streets, public transport, public schools or other public facilities, an equal share in the benefits conferred and services performed by government, equal access to the franchise and other avenues of political redress, equal immunity from governmental interference, and equal governmental protection, in their exercise of basic freedoms, or equal rights of property or contract. It is enough under the statute, we believe, if the evidence reveals a conspiracy to prevent Negroes from equally enjoying their legal rights generally, stated compendiously in the usage of

383 U.S. 745, 757–760, and the right to petition the *federal* government for a redress of grievances, recognized as an attribute of national citizenship in *United States* v. *Cruikshank*, 92 U.S. 542, 552, and by the dissent in *Collins v. Hardyman, supra,* 341 U.S. at 663. See A. 33–44. If that is a correct construction of the pleading, the case is very different. But, for our part, we find no allegation that the victims were travelling from one State to another, were using interstate highways, were hindered in petitioning the national government, or that the conspiracy was in any other respect directed at the exercise of "federal" rights not founded on the post-Civil War Amendments. See A. 5, 6.

the time as "equal protection of the laws" and "equal privileges and immunities under the laws."

In most contexts, that comes to the same thing as alleging a purpose to terrorize or otherwise intimidate black citizens on account of their race. Considering the conditions prevailing at the time of the relevant enactments, it would have been wholly natural to infer an intent to inhibit equal enjoyment of rights by Negroes from an assault that was shown to be motivated by the race of the victim, rather than by personal animosity against him as an individual. And, unhappily, circumstances have not so changed in a century as to render such a presumption unreasonable today—subject to rebuttal in a proper case.

It is another matter what is sufficient to establish that the assault was directed at the race of the victim, not at the man. Obviously, the fact that a conspiracy is involved, rather than individual action, will aid in that showing. See the opinion of Mr. Justice Douglas for four members of the Court in *United States* v. *Williams,* 341 U.S. 70, at 94. But, since the case was not allowed to go to trial, there is no occasion, at this stage, to speculate what evidence might be adduced in support of the claim. Plainly, the complaint itself was adequate. Although it is questionable whether the charge in a civil case need be tested by the strict standards of a criminal indictment, we accept the ruling in the *Cruikshank* case that it is not enough to allege that the plaintiff was black and the defendant white; as the Court there said (92 U.S. at 556), "[w]e may suspect that race was the cause of the hostility; but it is not so averred." Here, however, that pleading

requisite was more than satisfied. Not only was such a conclusory allegation included in terms, but the racial motive of the conspiracy was particularized as we have seen.

Assuming, as we must, that the plaintiffs can show that they were the victims of a conspiracy designed to intimidate them, because of their race, and, through them, the black community, we conclude that a case within Section 1985(3) has been stated. And we turn now to the constitutional inquiry—whether Congress has power to reach the conduct in suit.

II. SECTION 1985(3), CONSTRUED TO REACH THE CONDUCT ALLEGED, IS APPROPRIATE LEGISLATION UNDER THE THIRTEENTH AND FOURTEENTH AMENDMENTS

1. We approach the constitutional question in terms of the case. As we have attempted to show, the present complaint states a claim within that provision of Section 1985(3) which gives recovery to the victims of unofficial group conduct directed toward "depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." We are therefore excused from discussing the balance of the statute, comprising plainly severable provisions concerned with pressures applied against "the constituted authorities" and interference with voting in federal elections. Nor do we believe ourselves obligated to defend every possible application of the language on which we rely here. For present purposes, it is enough if the provision invoked is constitutional insofar as it reaches the kind of conduct revealed in the complaint—a conspiracy of violence directed against black

citizens on account of their race which, in context, has the obvious objective of deterring Negroes in the community from equally enjoying the benefits of law.

If, contrary to the opinion in *United States* v. *Harris, supra,* the portion of Section 1985(3) involved here was meant to go no further, there is no arguable severability problem. But we suggest the Court may properly consider the constitutional question in the context of this case without finally determining the full reach of the statute. That is so, in our view, because the conduct in suit is so obviously the core of the problem at which the statute was aiming that one can say with assurance that Congress would have enacted the measure for this purpose even if it had been known that nothing more could be brought within coverage. For the same reason, there can be no problem of fair notice in "severing out" the kind of situation involved here: Whatever doubts may exist whether conduct in the periphery is meant to be encompassed, the legislative purpose to reach racially-motivated assaults is plain, assuming it is constitutionally possible.

There is, of course, no novelty in this approach. Indeed, that is what the Court did in *Collins* v. *Hardyman* with respect to this very provision—albeit the statute was read more restrictively there than we believe constitutional problems required. The contrary course followed in *United States* v. *Harris,* and *Baldwin* v. *Franks, supra,* was in effect repudiated. And a like all-or-nothing ruling in *United States* v. *Reese,* 92 U.S. 214, has not survived as a viable precedent. The authoritative rule today is that articulated

in *United States* v. *Raines,* 362 U.S. 17, 20–24. We submit it governs here.

2. The constitutional question, limited to the dimensions of the case, is whether Congress may reach group action directed against Negroes on account of their race, which is calculated to prevent them from equally enjoying their civil rights as citizens of State and Nation. Our submission is that both the Thirteenth and Fourteenth Amendments authorize federal legislation to this end and that Section 1985(3), as applied to the conduct in suit, is an appropriate exercise of that power.

While we believe either Amendment, taken alone, vindicates our provision, there is no proper objection to invoking both the Thirteenth and Fourteenth Amendments and deriving the necessary legislative power from the combined force of the two Enforcement Clauses. The principle is well settled that Congress may borrow from more than a single source at one time. The governing rule is stated in the following passage from the *Legal Tender Cases,* 12 Wall. 457, 534:

> * * * it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. * * *

See, also, *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548–549; *Edye* v. *Robertson,* 112 U.S. 580, 595–596; *United States* v. *Gettysburg Electric R. Co.,* 160 U.S. 668, 683.

Nor is it any objection to invoking the Thirteenth Amendment that the original statute was passed primarily "to enforce the provisions of the Fourteenth Amendment." See 17 Stat. 13. As the cases just cited make clear, federal legislation is not a nullity merely because the enacting Congress mislabelled, or misunderstood, the true source of its power. As a matter of fact, however, the Ku Klux Act of 1871 recites that it was drawn to implement the Fourteenth Amendment "and for other Purposes." *Ibid.* The comparable title of the Enforcement Act of 1870, mentioning only enforcement of "the Right * * * to vote" and "other Purposes" (16 Stat. 140), has been deemed sufficient to justify construing Section 6 of that measure (now 18 U.S.C. 241) as embacing rights protected by the Fourteenth Amendment (*United States* v. *Price, supra,* 383 U.S. at 797–806), as well as other provisions of the Constitution (*United States* v. *Guest,* 383 U.S. 745, 757–760). See, also, *Katzenbach* v. *Morgan,* 384 U.S. 641, sustaining one section of the similarly entitled Voting Rights Act of 1965 as appropriate legislation under the Fourteenth Amendment.

Accordingly, invoking both sources of power, we turn to the precedents under the Thirteenth and Fourteenth Amendments.

3. There is, we submit, no viable obstacle in the past decisions of this Court to the proposition that the Thirteenth and Fourteenth Amendments, taken together, authorize Congress to reach unofficial con-

spiracies directed against the achievement of racial equality in community life. We immediately put to one side decisions dealing with the self-executing scope of the Amendments. If these cases form the great body of the jurisprudence touching the subject, it is only because during most of the intervening century—between 1875 and 1957—Congress made no attempt to enforce the post-Civil War Amendments. But, however numerous and settled, rulings defining the scope of the constitutional provisions *ex proprio vigore* cannot be taken as the measure of congressional power. Whatever doubts once existed, it is now settled that the enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments authorize federal legislation reaching further. *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 438–444; *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 648–651; *South Carolina v. Katzenbach*, 383 U.S. 301.

What remains is a handful of old cases, and some quite recent decisions (including those just cited), dealing with legislation implementing the Amendments. The actual result in the older decisions is not inconsistent with our submission that the Thirteenth and Fourteenth Amendments empower Congress to reach group conduct designed to prevent one race of citizens from enjoying civil equality. Thus, *United States* v. *Reese*, *supra*, and *James* v. *Bowman*, 190 U.S. 127, struck down legislation enacted under the Fifteenth Amendment at least partly on the ground that the statutes sought to reach more than race discrimination in the enjoyment of the franchise, the only subject of the Amendment. So, also, the rul-

ing in *United States* v. *Cruikshank, supra,* and *United States* v. *Harris, supra,* was in fact only that an ordinary case of battery, or murder, or a lynching, not motivated by race or class hostility, is beyond the power of Congress to punish. See, also, *United States* v. *Powell,* 212 U.S. 564. And, finally, whatever the present vitality of the *Civil Rights Cases,* 109 U.S. 3, striking down the Public Accommodations Law of 1875 as an unwarranted attempt to legislate with respect to "social rights" by controlling the proprietor "as to the guests he will entertain" (109 U.S. at 22, 24), that holding plainly does not control a case of racial violence aimed at hindering the black community in the enjoyment of all civil rights.

There is, to be sure, some language in *Cruikshank,* in *Harris,* and in the *Civil Rights Cases,* that points in a different direction. Those opinions, in some passages, seem to espouse an all-or-nothing approach: that conceding any national power under the Thirteenth and Fourteenth Amendments to reach unofficial conduct necessarily leaves Congress free to supersede the entire legal code of the States, because no convenient stopping place is apparent. That easy answer has been rejected, however, because it renders almost meaningless the Enforcement Clauses of the Amendments, which were thought to have important scope.

4. No such rule has, in fact, ever been followed under the Thirteenth Amendment. On the contrary, in the two sessions of Congress immediately following

the adoption of the Amendment, three statutes were enacted which plainly reach private action. One was the Civil Rights Act of 1866 (14 Stat. 27), whose first section (now 42 U.S.C. 1981, 1982) was recently construed in *Jones* v. *Mayer Co., supra.* The others are the Anti-Kidnaping Act of May 21, 1866 (14 Stat. 50, now 18 U.S.C. 1583), and the Anti-Peonage Act of March 2, 1867 (14 Stat. 546, now 18 U.S.C. 1581 and 42 U.S.C. 1994). And the Court has consistently recognized the propriety under this Amendment of laws operating directly against individuals acting on their own authority See *Slaughter-House Cases,* 16 Wall. 36, 78, 80; *Civil Rights Cases, supra,* 109 U.S. at 20, 23; *Clyatt* v. *United States,* 197 U.S. 207, 216–218; *Jones* v. *Mayer Co., supra,* 392 U.S. at 438.

The Thirteenth Amendment question is, rather, whether our provision is reasonably related to the objective of achieving meaningful emancipation for the former slave race. And, for this purpose, it is important that our case involves an assault against Negroes, broadly aimed at the black community. For, although the Amendment protects everyone against compulsory servitude (see *Slaughter-House Cases, supra,* 16 Wall. at 69, 72; *Bailey* v. *Alabama,* 219 U.S. 219, 240–242; *Pollock* v. *Williams,* 322 U.S. 4, 17–20), it reasonably authorizes legislation aimed at eradicating the remaining badges and vestiges of slavery only with respect to those who are identifiedly the descendants of slaves, notably our black citizens. As to them, however, the Enforcement Clause of the Amendment permits a wide range of solutions.

It is now settled that the Thirteenth Amendment empowers Congress to take all necessary measures to erase not only legal disabilities but also practical obstacles, imposed by private action, which perpetuate race discriminations in community life, including barriers erected to the Negro's "freedom to go and come at pleasure." *Jones* v. *Mayer Co., supra,* 392 U.S. at 443. And it seems hardly debatable that the kind of deliberate terrorism reflected by this record, obviously calculated to deter the Negro from claiming the full benefit of his emancipation as an ordinary citizen, is within the reach of that corrective power. Whatever the viability of the holding in the *Civil Rights Cases* that securing equal access to places of public accommodation was beyond Congressional authority in the circumstances of that time (see *Jones* v. *Mayer Co., supra,* 392 U.S. at 441, n. 78), it would not be "running the slavery argument into the ground" (109 U.S. at 24) to uphold federal legislation remedying concerted racial assaults as "appropriate" under Section 2 of the Thirteenth Amendment.

5. The question under the Fourteenth Amendment is not wholly different. There is no longer any issue whether Congress is barred from implementing the guarantee of the Equal Protection Clause by legislation that reaches conduct unsanctioned by State authority, merely because Section 1 of the Amendment is, in terms, addressed to the States. Whatever its currency at an earlier date, that view has been repudiated. Judging from the statutes they enacted,[7] no

[7] The Enforcement Act of 1870 contained at least three sections unquestionably embracing private conduct, including what

such restriction was recognized by the members of the contemporary Forty-First and Forty-Second Congresses, many of whom had been among the framers of the Fourteenth Amendment, or the similarly worded Fifteenth Amendment,[8] and must be assumed to have known, and observed, the limitations there announced. It was denied in the earliest federal court decisions construing the Enforcement Act of 1870, some of them by members of this Court sitting on cir-

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is now 18 U.S.C. 241 and two provisions invalidated by this Court partly on that ground. See *United States* v. *Reese*, *supra* (holding unconstitutional § 4 of the Act); *James* v. *Bowman*, *supra* (§ 5). And (assuming the correctness of our construction) the Ku Klux Act of 1871, in its Section 2, likewise reached wholly unofficial action.

[8] Thus, all 15 Senators who had voted in favor of the resolution proposing the Fourteenth Amendment in 1866 and who remained when the Enforcement Act of 1870 came before the Senate voted in favor of that measure (Cong. Globe, 39th Cong., 1st Sess., p. 3042; Cong. Globe, 41st Cong., 2d Sess., p. 3809). Significantly, all seven remaining members of the Joint Committee on Reconstruction who had supported the Report in favor of the Amendment voted for the 1870 Act (*ibid.*). Similarly, 11 of the 12 pro-Fourteenth Amendment Senators remaining voted for the Ku Klux Act of 1871 (Cong. Globe, 42d Cong., 1st Sess., pp. 808, 831). It is also noteworthy that Congressman Bingham, perhaps the chief artisan of the Fourteenth Amendment, endorsed the Ku Klux Act as wholly consistent with its purposes. Cong. Globe, 42d Cong., 1st Sess., App. 81–86.

Equally relevant to the question of the power of Congress to reach private action is the fact that, of the 39 Senators who had supported the Fifteenth Amendment (worded, like the Fourteenth, as a negative injunction addressed to the States), 28 remained and all voted in favor of the 1870 Act, which also purported to enforce that Amendment against wholly private conduct (Cong. Globe, 40th Cong., 3d Sess., p. 1641; Cong. Globe, 41st Cong., 2d Sess., p. 3809).

cuit.[9] It has been contradicted in congressional legislation of the past decade.[10] And, five Terms ago, it was expressly rejected by a majority of this Court. See *United States* v. *Guest, supra,* 383 U.S. at 761–762 (concurring opinion of Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Fortas), 774–784 (separate opinion of Mr. Justice Brennan, joined by Mr. Chief Justice Warren and Mr. Justice Douglas). And see, Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. 91.

This is not to say, of course, that the power of Congress under Section 5 of the Fourteenth Amendment is wholly unconfined. On the contrary, we assume that the point of addressing the "State" in Section 1 is to indicate that the Amendment is concerned alone with

[9] See, *e.g.*, *United States* v. *Hall*, 26 Fed. Cas. 79 (S.D. Ala. 1871, opinion by Judge Woods, later a Justice of this Court); *United States* v. *Given*, 25 Fed. Cas. 1324 (D. Del. 1873, opinion by Mr. Justice Strong); *United States* v. *Cruikshank*, 1 Woods 308, 25 Fed. Cas. 707 (D. La. 1874, opinion by Mr. Justice Bradley).

[10] See, *e.g.*, 42 U.S.C. 1971(c), as added by § 131 of the Civil Rights Act of 1957, which has been assumed to reach "purely private action designed to deprive citizens of the right to vote on account of their race or color" (*United States* v. *Raines*, *supra*, 362 U.S. at 20); 42 U.S.C. (Supp. V) 1973i(b), being § 11(b) of the Voting Rights Act of 1965, which prohibits voting intimidation by any person "whether acting under color of law or otherwise" (challenge held "premature" in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 317); 42 U.S.C. (Supp. V) 3604, being § 804 of the Civil Rights Act of 1968, which prohibits private discrimination in the sale or rental of dwellings (noted in *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 413); 18 U.S.C. (Supp. V) 245(b)(2), being § 101(a) of the Civil Rights Act of 1968, which punishes anyone "whether or not acting acting under color of law" who forcibly interferes with the enjoyment of certain State benefits free of race discrimination.

the "public sector," typically the area of public law, the outer perimeter of which includes only those activities and relationships in which the State is involved. We do not suggest that Congress, exercising its enforcement power, can expand the scope of concern. The only legitimate goal of legislation under the Amendment is to assure that those to whom the State owes "equal protection" and "due process" are not denied the benefit of those guarantees. But, if directed to that end, any "appropriate" means are permissible. See *Katzenbach* v. *Morgan, supra,* 384 U.S. at 650–651; *Ex Parte Virginia,* 100 U.S. 339, 345–346. And this includes measures directed against anyone, State officer or private citizen, whose actions effectively interfere with the realization of the Amendment's objectives.

The present case offers no occasion to consider what federal legislation running against private conduct might be appropriate to enforce the guaranties of the Due Process Clause. It may be that Section 5 of the Fourteenth Amendment does not authorize national laws to protect "life, liberty or property" against wholly private action not motivated by race or class hostility. The reasoning would be that such conduct directed against those "natural rights of man" is an ordinary tort or crime which always has been exclusively State business, and must so continue unless the federal government is to undertake full police duty in all local jurisdictions. See, *e.g., United States* v. *Cruikshank, supra,* 92 U.S. at 551–552, 553–554; *Snowden* v. *Hughes, supra,* 321 U.S. at 11. Of course,

State officers and those acting under their umbrella who deprive citizens of life or liberty without due process are amenable to national laws. *E.g., Screws* v. *United States, supra; Williams* v. *United States,* 341 U.S. 97; *United States* v. *Price, supra.* But ordinary murder, even lynching of a State prisoner without official complicity and unmotivated by race, has been held beyond federal reach. That is the essential holding of *Cruikshank, Harris* and *Powell.*

The same limitations do not apply, however, when Congress seeks to implement the guaranties of the Equal Protection Clause against unofficial conduct, at least with respect to race discrimination. Here, historical realities required, and considerations of federalism did not oppose, a different rule. Thus, repeatedly, the *Cruikshank* opinion stresses the absence of any allegation that the victims were assaulted on account of their race (92 U.S. at 554, 555, 556), and the same point is made in *Harris* (106 U.S. at 637, 641). See, also, *United States* v. *Reese, supra,* 92 U.S. at 218, 220; *James* v. *Bowman, supra,* 190 U.S. at 139, 142. The implication is that Congress might reach unofficial conduct directed against Negroes because of their race—or, perhaps, against any identifiable class of persons because of their membership in it.

This view reflects the fact that, unlike the "natural rights" mentioned in the Due Process Clause, immunity from discrimination on account of race or color was a new constitutional right, created by the post-Civil War Amendments, the enforcement of which, in the existing context, might well call for a national effort. The point of the Equal Protection

Clause, after all, is not to assure a blameless State, but rather, "to secure to all persons the *enjoyment* of perfect equality of civil rights". *Ex Parte Virginia, supra,* 100 U.S. at 346 (emphasis supplied). See, also, *Strauder* v. *West Virginia,* 100 U.S. 303, 310; *Neal* v. *Delaware,* 103 U.S. 370, 386. Cf. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373–374. And, the practical implementation of the promise of equality, it was recognized from the beginning, would require more than State abstention. Yet, here, conceding federal power to combat private conspiracies offers no serious threat of superseding all local regulation of public affairs.

6. In judging the constitutional "appropriateness" of Section 1985(3) as applied to a case like ours, it is proper to emphasize that the statute does not purport to reach to the boundaries of the Equal Protection Clause, but only regulates the more serious threats to basic equality. While it is enough under Section 5 of the Fourteenth Amendment if one can "perceive a basis" for the conclusion that the means selected would serve to promote equal protection (*Katzenbach* v. *Morgan, supra,* 384 U.S. at 653, 656), such legislation is the more securely anchored in the Constitution when it confines itself to the core problem and deals only with those aspects of it that apparently call for national solutions.

It is significant, first, that we are concerned here with *group conduct.* The isolated act of a single individual does not usually carry the same dangers. As traditional criminal law recognizes by singling out concerted action to punish even the inchoate offense and penalize it more severely, a conspiracy presents a

special threat, if only because of the greater likelihood of success. And so, it is clear that the national government has better cause to intervene here than with respect to individual action. That is especially relevant when considering legislation purporting to implement the Fourteenth Amendment, which primarily speaks to the States. For group action bears some of the same characteristics as governmental action, and it is sometimes beyond the capacity, or the will, of local authorities to inhibit.

The analogy is sufficiently familiar in the case of large-scale combinations wielding power equal to, and sometimes greater than, that of local governments—like the Klan of the post Civil War era or the large corporations and associations of today. Cf. *Terry* v. *Adams,* 345 U.S. 461; *Steele* v. *L. & N. R. Co.,* 323 U.S. 192; *Marsh* v. *Alabama,* 326 U.S. 501; *Food Employees* v. *Logan Plaza,* 391 U.S. 308. And see, *Collins* v. *Hardyman, supra,* 341 U.S. at 662. But the point remains relevant in less extreme circumstances, if only because here, as elsewhere, Congress can reasonably determine that effective suppression of the primary evil, and the practical difficulties of assessing the seriousness of the peril on each occasion, requires it to fashion a wider net to reach all unofficial conspiracies, rather than attempt to draw an unsure line between the large and the small. Cf. *Everard's Breweries* v. *Day,* 265 U.S. 545; *South Carolina* v. *Katzenbach, supra; Jones* v. *Mayer Co., supra.* It is not irrelevant that the statute in suit and 18 U.S.C. 241, two contemporaneous efforts to implement the Fourteenth Amendment in otherwise broad terms, both

limit their reach to group conduct, albeit including all conspiracies of "two or more persons".

We do not claim an unconfined national power to reach all criminal conspiracies. The present suit rests on no such novel proposition. We do assert that congressional authority may be greater when group action is involved. But that is only one aspect of the matter. The more important factor here, in our view, is that the case arises from an assault *on account of race.* That is, of course, what justifies reliance on the Thirteenth Amendment. But the anti-race motivation of the conduct is also relevant to congressional power under the Fourteenth Amendment.

As has been recognized since the *Slaughter-House Cases* in 1872, although only the Fifteenth Amendment explicitly mentions race or color, "any fair and just construction of any section or phrase" of the Fourteenth Amendment also must take into account "the one prevading purpose" behind the adoption of all the post-Civil War Amendments, which is "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." 16 Wall. at 71–72. Thus, one may properly concede greater latitude to Congress when it is legislating to protect those for whose special benefit the Amendment was framed. Indeed, the course of decisions in this Court reflects that approach, attaching relevance to the fact that the claim or the statute invoked was confined to race discrimination (*e.g.*, *Strauder* v. *West Virginia, supra,* 100 U.S. at 306–

307; *Shelley* v. *Kraemer,* 334 U.S. 1, 23; *Bolling* v. *Sharpe,* 347 U.S. 497, 499; *Goss* v. *Board of Education,* 373 U.S. 683, 687–688; *McLaughlin* v. *Florida,* 379 U.S. 184, 191–192), or, on the contrary, was not so limited (*e.g., United States* v. *Reese, supra,* 92 U.S. at 218–221; *United States* v. *Cruikshank, supra,* 92 U.S. at 554–556; *United States* v. *Harris, supra,* 106 U.S. at 639; *James* v. *Bowman, supra,* 190 U.S. at 139–142; *Fay* v. *New York,* 332 U.S. 261, 282–284; *Collins* v. *Hardyman, supra,* 341 U.S. at 661–662).

We submit that the historical purpose of the Fourteenth Amendment to raise up the former slave to equal enjoyment of civil rights is pertinent in assessing the power of Congress to legislate in favor of the Negro. This is where all the post-Civil War Amendments come together. While the Fifteenth Amendment is not a source of power in this instance, it is certainly relevant that, as applied here, our statute draws from both the Thirteenth and Fourteenth Amendments. The two provisions fortify each other and the point where they meet is surely the strongest source.

CONCLUSION

We have said that the case involves not only a cruel beating, but *concerted* violence by a group of persons directed against black citizens *because of their race.* This is radically different from the ordinary crime of battery, or even murder—normally a purely State concern. It is no part of our submission that the post-Civil War Amendments so altered our federal system that Congress was thereafter authorized to make offenses against the Nation all that before had been

crimes or torts under the law of the States. See *Snowden* v. *Hughes, supra,* 321 U.S. at 11. As was said in the *Slaughter-House Cases, supra,* 16 Wall. at 82, "we do not see in those amendments any purpose to destroy the main features of the general system." We have no quarrel with the teaching of *United States* v. *Cruikshank, supra,* 92 U.S. at 556, that "the United States have [not] the power [n]or are required to do mere police duty in the States." Nothing of the kind is involved here.

We suggest only that federal law properly may remedy a fundamental deprivation of that civil equality which the Thirteenth and Fourteenth Amendments enjoined the States to accord and authorized the Congress to enforce. That is the role undertaken by Section 1985(3), which, in our view, embraces the claim stated in the complaint.

Accordingly, we urge reversal of the rulings below and a remand of the case to the district court for trial on the merits.

Respectfully submitted.

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AUGUST 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970